No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

---

BRIEF OF ARBITRATION AND CONTRACTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Francis J. Balint, Jr.
Counsel of Record
Andrew S. Friedman
BONNETT FAIRBOURN
FRIEDMAN & BALINT, P.C.
2325 E. Camelback Road
Suite 300
Phoenix, AZ 85016
(602) 274-1100
fbalint@BFFB.com

Richard H. Frankel
DREXEL UNIVERSITY
KLINE SCHOOL OF LAW
3320 Market Street
Philadelphia, PA 19104
(215) 571-4807
rhf24@drexel.edu

Dated: July 24, 2015

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Under the FAA, the Question of Whether the Parties Formed an Agreement to Arbitrate This Dispute Is a Question of State Law 4

II. This Court Has Previously Rejected Efforts to Replace State Contract Law With Federal Common Law Simply Because the Dispute Involves an Arbitration Clause 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.,
470 F. App'x 652 (9th Cir. 2012) 9

Arthur Anderson LLP v. Carlisle,
556 U.S. 624 (2009) 5, 8

AT&T Technologies, Inc. v. Communications Workers,
475 U.S. 643 (1986) 5

Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.,
748 F.3d 249 (5th Cir. 2014) 9

First Options of Chicago v. Kaplan,
514 U.S. 938 (1995) 4, 5, 6, 7

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 4

Granite Rock Co. v. Int'l Bhd. of Teamsters,
561 U.S. 287 (2010) 7

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 9

Mundi v. Union Sec. Life Ins. Co.,
555 F.3d 1042 (9th Cir. 2009) 10

Lawson v. Life of the South Ins. Co.
648 F.3d 1166 (11th Cir. 2011) 8, 9

Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford, Jr. Univ.,
489 U.S. 468 (1989) 5, 6

Wash. Mut. Fin. Group, L.L.C. v. Bailey,
364 F.3d 260 (5th Cir. 2004) 9

Statutes

Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* 3

INTEREST OF *AMICI CURIAE*[1]

This case involves a question of substantial importance to the field of arbitration. *Amici* are arbitration and contracts scholars. They file this brief to give the Court the benefit of their many years of scholarly study. In *amici*'s view, both the Federal Arbitration Act and principles of federalism preserve an important role for state courts in applying their own state's contract law to arbitration clauses, just as they do with any other contract. Petitioner's position, if accepted, would result in a federal common law of contracts and would upend this Court's repeated pronouncements that state contract law, rather than federal law, determines whether the parties have entered into a valid agreement to arbitrate. *Amici* include:

Richard Alderman is Professor Emeritus and Director of the Center for Consumer Law at the University of Houston Law Center. Formerly, he was the Dwight Olds Chair in Law, Associate Dean and Interim Dean at the Law Center. Professor Alderman has published and spoken frequently on matters relating to arbitration and alternative dispute resolution, has testified before Congress regarding the Arbitration Fairness Act, and has served as an

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

arbitrator and has often testified in arbitration proceedings.

Lisa Blomgren Amsler is the Keller-Runden Professor of Public Service at Indiana University, where her research focuses on dispute resolution systems. As a former arbitrator, she has handled labor, employment, and sports disputes for the American Arbitration Association and the Federal Mediation and Conciliation Service. She served as a Council Member of the American Bar Association's Section of Dispute Resolution, and as Co-Chair of its Consumer Arbitration Study Group.

Carol Chomsky is Professor of Law at the University of Minnesota Law School, where she has been on the faculty since 1985 and served as Associate Dean for Academic Affairs in 2012-2015. She is the co-author of the casebook *Contracts: A Contemporary Approach* (2d ed. 2013), and the casebook *Learning Sales*. Her scholarship addresses topics in history, contracts law, and pedagogy.

Karen Halverson Cross is Professor of Law at the John Marshall Law School in Chicago. She has written several articles on the law of arbitration, including *Letting the Arbitrator Decide Unconscionability Challenges*, 26 Ohio St. J. on Disp. Res. 1 (2011).

Mark C. Rahdert is a Professor of Law at the Temple University Beasley School of Law. Professor Rahdert specializes in the areas of federal courts and constitutional law.

SUMMARY OF ARGUMENT

This case concerns a state court's interpretation of a contract provision under state law. This is a classic role for state courts to play and something that state courts do all the time. Contract disputes ordinarily present questions of state law that are resolved by state courts applying that law.

Nothing about that paradigm changes simply because a state court is deciding whether the parties formed an agreement to arbitrate rather than deciding any other contractual question. The California Court of Appeal's actions below were perfectly consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, which enshrines state contract law as the governing law for determining whether the parties to a contract have agreed to arbitrate a particular dispute.

Petitioner seeks to upend these principles by arguing that the California Court of Appeal's application of California law to a California contract somehow violates the FAA because the court, in applying those settled state-law principles, determined that the parties did not enter an agreement to arbitrate. That is incorrect because the FAA incorporates, rather than overrides, state contract law. This Court has previously stopped lower courts and litigants from federalizing questions of state contract law simply because they arise in the context of an arbitration clause, and has reaffirmed the importance of state contract law. Just as in any other contract dispute, state law governs, and this Court should apply state law here.

ARGUMENT

I. Under the FAA, the Question of Whether the Parties Formed an Agreement to Arbitrate this Dispute Is a Question of State Law.

Just as with any other contractual term, state law governs the meaning of an arbitration clause within a contract. This derives from the Act's purpose to treat contracts for arbitration just like any other contract. The Act was adopted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Accordingly, just like any other contract, the question of whether the parties have entered into a valid agreement to arbitrate is governed by state law. More than twenty years ago, this Court enshrined this uncontroversial principle in *First Options of Chicago, Inc. v. Kaplan*, stating: "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts."[2] 514 U.S. 938, 944 (1995).

---

[2] The one "qualification" this Court identified is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Kaplan*, 514 U.S. at 944 (quoting

The Court emphasized that a dispute over arbitration is nothing more than a specific type of contract dispute. It explained that "arbitration is simply a matter of contract between parties; it is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* More recently, this Court again emphasized that the FAA "does not alter background principles of state contract law" as they apply to arbitration clauses. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Thus, while Petitioner and its *amici* vigorously repeat their mantra that the FAA requires courts to "enforce the parties' arbitration agreement according to its terms," *e.g.* Pet'r Br. 11, that is beside the point. Even assuming that statement is true, what those terms mean, and whether they evidence an agreement to arbitrate in the first place, is a matter of state law. Indeed, in *Volt*, this Court refused to second guess the California Court of Appeal's determination as a matter of state contract law that an arbitration provision's choice of law clause incorporated California's arbitration rules that would otherwise be displaced by the FAA. *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 476-79 (1989) (applying the state-court of appeal's interpretation of the choice of law provision and holding that the state-court's interpretation was not preempted).

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

Here, Petitioner may not like the California Court of Appeal's application of its own state law, but that in and of itself does not violate the FAA. Enforcing an arbitration agreement according to its terms is not a mandate for federal courts to override any state-court interpretation of state contract law that does not result in an order compelling arbitration.

Any other reading of the FAA turns arbitration from a consensual process into a coerced one. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Yet, Petitioner's argument that this Court must compel arbitration as a matter of federal law even where a state court determines as a matter of its own state's law that the parties never formed an arbitration agreement would force parties into arbitration when they never agreed to it. This would undermine the FAA's goal of sending to arbitration "only those disputes" that the parties agreed to arbitrate. *Kaplan*, 514 U.S. at 944.

That state contract law determines whether the parties' dispute must be sent to arbitration is especially evident given that the issue here is whether a valid arbitration agreement was formed in the first place. As Respondents have detailed, the customer service agreement provides for arbitration only where the "law of your state" would permit arbitration. Resp. Br. 40-43. In other words, while there is no dispute that the contract contains an arbitration *clause* that sets the conditions under which the parties will have been deemed to have

entered an agreement to arbitrate, there is no *agreement* to arbitrate because the pre-requisite to such an agreement—that it would be allowed by "the law of your state"—is absent. *Id.*

As already explained, *Kaplan* establishes that formation questions are resolved according to "ordinary state law principles that govern the formation of contracts" generally. 514 U.S. at 944. Petitioner tries to circumvent this principle by arguing that this dispute implicates the federal policy favoring arbitration. Pet'r. Br. 12-13. But the federal policy favoring arbitration does not apply to the antecedent question of whether the parties entered an agreement to arbitrate in the first place. Thus, this Court recently declined to apply any federal policy regarding arbitration to the question of when a collective bargaining agreement "that contains the parties' arbitration clause was ratified and thereby formed." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (footnote omitted). It explained that "we have never held that the policy overrides the principle that a court may submit to arbitration 'only those disputes that the parties have agreed to submit.'" *Id.* at 302 (quoting *Kaplan*, 514 U.S. at 943). Rather, this Court has only applied the federal policy "where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed ." *Id.* at 303. Accordingly, the federal policy is inapplicable here, and state law controls.

II. This Court Has Previously Rejected Efforts to Replace State Contract Law With Federal Common Law Simply Because the Dispute Involves an Arbitration Clause.

Petitioner misconstrues the FAA in trying to federalize what is a garden-variety question of state contract law. This is not the first time that parties or courts have improperly tried to read state contract law out of the FAA. This Court has previously put to rest other attempts to use the FAA to turn state-contract law questions into federal issues simply because the case involves an arbitration clause. Many arbitration-related disputes concern whether an arbitration provision can be enforced by, or against, a non-signatory to the contract containing the arbitration provision. *See, e.g., Carlisle*, 556 U.S. at 632 (describing non-signatory's attempts to enforce arbitration clause under the doctrine of equitable estoppel). Just as contract formation questions are addressed by state contract law, states also have developed principles to determine when non-signatories can fall within the reach of an arbitration clause, through such doctrines as estoppel, third-party beneficiary, agency, alter ego and others. *See, e.g., Lawson v. Life of the South Ins. Co.* 648 F.3d 1166, 1171-75 (11th Cir. 2011) (applying Georgia law regarding third-party beneficiary and equitable estoppel in finding that a non-signatory could not enforce an arbitration provision).

Despite the fact that state law principles already in place address non-signatory rights, a number of

federal courts had decided that in the area of arbitration, federal law should determine whether a non-signatory can enforce, or can be bound by, the arbitration provision. *See, e.g., Wash. Mut. Fin. Group, L.L.C. v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (holding that "a court should look to the federal substantive law of arbitrability" to determine a non-signatory's rights and noting that nearly all other federal circuits to address the question have reached the same conclusion); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 n. 4 (4th Cir. 2000) (same).

Subsequently, this Court rejected that approach in *Arthur Andersen v. Carlisle*. 556 U.S. 624 (2009). There, this Court made clear that a non-party to an arbitration provision may enforce it "if the relevant state contract law allows him to enforce the agreement." *Id.* at 632. As a result, lower courts have now acknowledged that their previous attempts to craft a federal common law of contracts for the question of non-signatory rights was improper and that they instead must apply state contract law principles. *See, e.g., Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014) (noting that its prior decisions "applying federal common law, rather than state contract law" to non-signatory questions was incorrect and had been modified to conform with *Carlisle*); *Lawson*, 648 F.3d at 1171 (finding that *Carlisle* established that state law controls whether a non-signatory falls within an arbitration provision, and that any prior decisions applying federal law were abrogated); *see also Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.*, 470 F. App'x 652, 653 (9th Cir. 2012) (non-

precedential) ("The district court applied our court's decision in *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-47 (9th Cir. 2009), while under the Supreme Court's decision in [*Carlisle*], the district court should have applied state law, not federal common law.").

In short, not every question concerning the interpretation of an arbitration clause is a question of federal law simply because an arbitration clause is involved. Rather, the question of whether an arbitration clause was validly formed, just like the question of whether any other contract was validly-formed, is governed by state contract law. The California Court of Appeal did exactly what it was supposed to do in applying California contract law to determine if the parties entered into a valid agreement to arbitrate.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

Francis J. Balint, Jr.
Counsel of Record
Andrew S. Friedman
BONNETT FAIRBOURN
FRIEDMAN & BALINT, P.C.
2325 E. Camelback Road
Suite 300
Phoenix, AZ 85016
(602) 274-1100
fbalint@BFFB.com

Richard H. Frankel
DREXEL UNIVERSITY
KLINE SCHOOL OF LAW
3320 Market Street
Philadelphia, PA 19104
(215) 571-4807
rhf24@drexel.edu

Date: July 24, 2015